171

(3)

No. 09-1539

Supreme Court, U.S.
FILED
SEP 17 2010
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

DANIEL RAY WILKES,
Petitioner,

v.

STATE OF INDIANA,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Indiana

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

Office of the Indiana
Attorney General
IGC South, Fifth Floor
302 W. Washington St.
Indianapolis, IN 46204
(317) 232-6201
tom.fisher@atg.in.gov

**Counsel of Record*

GREGORY F. ZOELLER
Attorney General
THOMAS M. FISHER*
Solicitor General
STEPHEN R. CREASON
Chief Counsel

Counsel for Respondent

CAPITAL CASE

QUESTIONS PRESENTED

I. Should the Court reconsider *Berghuis v. Thompson*, 130 S. Ct. 2250, 2259-60 (2010), and decide that a suspect may cause questioning to cease by ambiguously asserting his right to silence during a custodial interrogation?

II. Should the Court reconsider *Kansas v. Marsh*, 548 U.S. 163, 173 (2006), and find a Constitutional requirement that the prosecution must prove beyond a reasonable doubt to a jury that the aggravating circumstances outweigh the mitigating circumstances before a defendant may be sentenced to death?

III. Should the Court reconsider *Clemons v. Mississippi*, 494 U.S. 738, 748-50 (1990), and prohibit the practice of "appellate reweighing" by state appellate courts to cure errors in a capital sentence?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT 1

REASONS TO DENY THE PETITION 4

I. The Court should not revisit the question whether equivocal or ambiguous assertions of the right to silence require police to cease questioning a suspect 4

II. The Constitution does not require the weighing of aggravating and mitigating circumstances to be done "beyond a reasonable doubt" 5

III. Appellate reweighing is an appropriate tool to cure error in capital sentencing 5

CONCLUSION 7

TABLE OF AUTHORITIES

Cases

Berghuis v. Thompson, 130 S. Ct. 2250 (2010) ..... i, 4
Clemons v. Mississippi, 494 U.S. 738 (1990)..... i, 6
Kansas v. Marsh, 548 U.S. 163 (2006) ..... i, 5
Kubsch v. State, 866 N.E.2d 726 (Ind. 2007), *reh'g denied*, *cert. denied* 5
Ring v. Arizona, 536 U.S. 584 (2002) 5
Walton v. Arizona, 497 U.S. 639 (1989) 5

RESPONDENT'S BRIEF IN OPPOSITION

The State of Indiana respectfully opposes Wilkes's petition seeking certiorari review of his convictions for triple murder and resulting sentences of death.

STATEMENT

Wilkes stands convicted and sentenced to death for the murder of Donna Claspell and her two young daughters, Sydne and Avery. The Indiana Supreme Court summarized the evidence underlying these crimes:

> In the spring of 2006, Daniel Wilkes met Donna Claspell and Michael Baker while all three were being treated at a drug rehabilitation center. After discharge, Wilkes stayed with Donna and her two daughters, eight-year-old Sydne Claspell and thirteen-year-old Avery Pike. Wilkes told Baker that one night he awoke to find Avery "hunching on his leg," and that he and Avery then engaged in mutual oral sex. Wilkes later admitted to molesting Avery on a total of three or four occasions. On the evening of April 23 or the early morning of April 24, Donna found Wilkes and Avery together and told Wilkes that he would have to leave the home.
>
> Around eight o'clock the next morning, Donna's neighbors observed Baker picking up Wilkes at the home, and one heard Wilkes say something like, "I've got to get out of here." That night, according to Baker, Wilkes kept looking

> out the windows and expressed concern that the police would come for him.
>
> On April 26, the bodies of Donna, Sydne, and Avery were found in their home. Donna and Sydne were in the master bedroom. Donna had sustained multiple injuries, including a deep cut wound to the neck and blows to the head from a hammer and another blunt instrument. A knife was found under Donna's shoulder. Sydne had died from at least twenty-seven blows to the head, back, and shoulders from a hammer head and claw. Avery was found in her bedroom naked and face down on the bed. Her hands were bound behind her back with a cord, her ankle was tied to the bedpost, and she had been strangled with a piece of clothing.
>
> DNA and serological tests were performed on several items from Donna's home and also on clothing Wilkes was wearing at the time of his arrest. Donna's blood was found on the ball and claw of a hammer and on a level found at the home, and also on a shirt and hat worn by Wilkes. Sydne's blood was found on the claw of the hammer and on Wilkes's shirt and her DNA was found on Wilkes's shoe. Wilkes confessed to the murders[.]

Pet. App. 3-4.

A jury found Wilkes guilty of three counts of murder. The State requested that the death penalty be imposed, but the jury was unable to reach a unanimous recommendation as to the appropriate sentence. Following Indiana law applicable at the time, the trial court declined to consider the jury's

inability to agree unanimously on the sentencing recommendation as a relevant factor in determining whether Wilkes should receive the death penalty. The trial court imposed the death penalty.

Wilkes appealed to the Indiana Supreme Court. He raised numerous arguments, three of which are relevant to his petition. First, Wilkes argued that he invoked his right to silence when being interrogated by police and therefore some of his inculpatory statements should have been suppressed. Second, Wilkes argued that the federal Constitution requires that the prosecution prove to the jury beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances. Third, Wilkes argued that the trial court should have considered the jury's inability to reach a unanimous sentencing recommendation before sentencing him to death.

The Indiana Supreme Court affirmed Wilkes's convictions and sentences on December 10, 2009. Pet. App. 2-35. The court first found that Wilkes did not assert unambiguously his right to silence during questioning by police and so therefore the trial court properly admitted subsequent portions of Wilkes's inculpatory statements. Pet. App. 10-11. Second, the court reaffirmed its view that the weighing of aggravating and mitigating circumstances is not a functional equivalent to an element and therefore need not be proven beyond a reasonable doubt. Pet. App. 24-25. The court also held that in light of recent developments in Indiana law, trial courts should now consider a jury's inability to reach a unanimous sentencing recommendation when

determining the appropriate sentence for a capitally charged defendant. Pet. App. 31-34. Furthermore, the court independently reweighed the aggravating and mitigating evidence, including the jury's non-recommendation, and nonetheless determined that Wilkes should be sentenced to death. Pet. App. 34-35. The Indiana Supreme Court denied Wilkes's petition for rehearing on March 16, 2010. Pet. App. 48-49.

REASONS TO DENY THE PETITION

I. The Court should not revisit the question whether equivocal or ambiguous assertions of the right to silence require police to cease questioning a suspect

Just last term, the Court explained that in order to end an interrogation by invoking the Sixth Amendment right to silence, suspects must unequivocally assert the right. *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2259-60 (2010). It expressly declined to require police to guess about a suspect's intent in the face of ambiguous assertions of silence, *id.* at 2260, yet Wilkes invites the Court to do just that mere months later. Wilkes offers no split of authority among the circuits or States, nor is Respondent aware of any. The Indiana Supreme Court correctly found that Wilkes did not unambiguously assert his right to silence (Pet App. 10-11), and Wilkes concedes the question here. Pet. 18. There is no reason for the Court to revisit *Berghuis*.

II. The Constitution does not require the weighing of aggravating and mitigating circumstances to be done "beyond a reasonable doubt"

The Indiana Supreme Court properly rejected Wilkes's argument that the weighing of aggravating and mitigating circumstances is subject to proof beyond a reasonable doubt pursuant to *Ring v. Arizona*, 536 U.S. 584 (2002). It is constitutional for a state to impose the death penalty when the aggravating and mitigating circumstances are in equipoise, or even place the burden on a defendant to prove mitigating circumstances outweigh aggravating ones. *Kansas v. Marsh*, 548 U.S. 163, 173 (2006) (weighing in equipoise); *Walton v. Arizona*, 497 U.S. 639, 650 (1989) (placing burden on defendant), *overruled on other grounds by Ring*, 536 U.S. 584. Wilkes's argument that the Constitution requires prosecutors to prove that aggravators outweigh mitigators beyond a reasonable doubt is incompatible with *Marsh* and *Walton*. *Accord Kubsch v. State*, 866 N.E.2d 726, 739 (Ind. 2007), *reh'g denied, cert. denied.*

Wilkes points to no split of authority on this issue or otherwise explains how this issue is of extraordinary importance warranting plenary review.

III. Appellate reweighing is an appropriate tool to cure error in capital sentencing

The Eighth Amendment permitted the Indiana Supreme Court to conduct appellate reweighing in

order to correct any error in the trial court's refusal to consider the jury's inability to reach a unanimous sentencing recommendation, as this Court has squarely held. *Clemons v. Mississippi*, 494 U.S. 738, 748-50 (1990) (appellate reweighing of aggravating and mitigating circumstances is constitutionally permissible to cure errors in capital sentencing process). The Indiana Supreme Court accepted this Court's invitation and reweighed for itself all of the aggravating and mitigating evidence—including the fact that the jury did not reach a unanimous recommendation before independently concluding Wilkes should be sentenced to death. Pet. App. 34-35. His Eighth Amendment right to be free from an arbitrary and capricious sentence is intact.

Wilkes offers no reason to reconsider *Clemons*, fails to identify any confusion among the States on how appellate reweighing should be utilized, or otherwise offer any persuasive justification for granting review.

CONCLUSION

The Court should deny the petition.

Respectfully submitted,

GREGORY F. ZOELLER
Attorney General
THOMAS M. FISHER*
Solicitor General
STEPHEN R. CREASON
Chief Counsel

Counsel for Respondent
**Counsel of Record*

Dated: September 17, 2010